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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Baltimore Date: SEP 14 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The Associate Commissioner affirmed that decision on a motion to reopen. The matter is before the Associate Commissioner on a second motion to reopen. The motion will be denied, and the order dismissing the appeal will be reaffirmed.

The applicant is a native and citizen of Nigeria who was present in the United States without a lawful admission or parole as early as 1991. She was found to be inadmissible to the United States under § 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation in 1990. The applicant married a native of Nigeria and naturalized U.S. citizen in January 1996 and is the beneficiary of an approved immediate relative visa petition. The applicant seeks the above waiver in order to remain in the United States and reside with her spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

In his decision, the district director noted that the applicant's spouse (hereafter referred to as Suleiman) was suffering from Major Depressive Disorder which predated his marriage to the applicant and did not solely hinge on the prospect of his present wife's departure from the United States.

On the first motion, counsel disagreed with that conclusion and stated that the Service's determination is directly contradicted by [redacted] August 14, 1998 evaluation. Counsel submits a letter dated August 28, 1998 from [redacted] which indicates that [redacted] was diagnosed with a severe form of diabetes mellitus type II. Counsel re-stresses that if the applicant is forced to leave the United States, Suleiman will lose his health insurance coverage.

On second motion, counsel states that the Service chooses to discount the applicant's marriage by calling it an "after acquired equity." Counsel states that the issue is the strength of the underlying relationship which gives rise to the equity not whether it was after-acquired.

The Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States unlawfully in 1991 after attempting to gain admission by fraud in 1990 and married her spouse in 1996. She now seeks relief based on that after-acquired equity.

[redacted]

The record reflects that the applicant attempted to procure admission into the United States from Canada on December 30, 1990 by presenting a counterfeit Temporary resident Card (Form I-688) and a Nigerian passport in another person's name. The applicant was released into Canadian custody and held in detention until February 5, 1991 when she was released on bond. She was scheduled for inquiry in Canada on May 23, 1991, but failed to appear. The applicant was present in the United States without a lawful admission or parole after February 5, 1991.

It is noted that when the applicant was being escorted back to Canada on the pedestrian walk across the Rainbow Bridge, the applicant attempted to jump over the wall. She was chased by Service officers and apprehended near the toll area. After being returned to and detained by Canadian officials, she made a claim to refugee status.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
>
> (C) MISREPRESENTATION.-
>
> (i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

> (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.
>
> (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a)(6)(C)(i) violation

due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

In 1986, Congress expanded the reach of the ground of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, § 6(a), 100 Stat. 3537, redesignated as § 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067). In 1986, Congress imposed the statutory bar on (a) those who made oral or written misrepresentations in seeking admission into the United States; (b) those who have made material misrepresentations in seeking entry admission into the United States or "other benefits" provided under the Act; and (c) it made the amended statute applicable to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment based on fraud or misrepresentation occurring before, on, or after such date. This feature of the 1986 Act renders an alien perpetually inadmissible based on past misrepresentations.

In 1990, § 274C of the Act, 8 U.S.C. 1324c, was inserted by the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) provided penalties for document fraud stating that it is unlawful for any person or entity knowingly-

> (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,...(or to obtain a benefit under this Act). The latter portion was added in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act (P.L. 103-322, September 13, 1994), which enhanced the criminal penalties of certain offenses, including 18 U.S.C. 1546:

> (a)...Impersonation in entry document or admission application; evading or trying to evade immigration laws using assumed or fictitious name...knowingly making false statement under oath about material fact in immigration application or document....

[redacted]

(b) Knowingly using false or unlawfully issued document or false attestation to satisfy the Act provision on verifying whether employee is authorized to work.

The penalty for a violation under (a) increased from up to 5 years imprisonment and a fine or both to up to 10 years imprisonment and a fine or both. The penalty for a violation under (b) increased from up to 2 years imprisonment or a fine or both to up to 5 years imprisonment or a fine, or both.

To recapitulate, the applicant knowingly attempted to procure admission into the United States by fraud in December 1990 by presenting a counterfeit Temporary Resident Card (Form I-688) and a Nigerian passport in another person's name (a felony).

In 1996, Congress expanded the document fraud liability to those who engage in document fraud for the purpose of obtaining a benefit under the Act. Congress also restricted § 212(i) of the Act in a number of ways with the recent IIRIRA amendments. First, immigrants who are parents of U.S. citizen or lawful permanent resident children can no longer apply for this waiver. Second, the immigrant must now show that refusing him or her admission would cause extreme hardship to the qualifying relative. Third, Congress eliminated the alternative 10-year provision for immigrants who failed to have qualifying relatives. Fourth, Congress eliminated judicial review of § 212(i) waiver decisions, and Fifth, a child is no longer a qualifying relative.

After reviewing the amendments to the Act and to other statutes regarding fraud and misrepresentation from 1957 to the present time, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, and the re-inclusion of the perpetual bar, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez-Moralez, 21 I&N Dec. 296 (BIA 1996).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this

country; and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In Matter of Cervantes-Gonzalez, the Board also held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a § 212(i) waiver application in the exercise of discretion. Matter of Tijam, Interim Decision 3372 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

Counsel asserts that Suleiman has worked hard to become a U.S. citizen and he is entitled to and has the right to remain in the United States. Counsel states that it is against public policy to destroy a family without extraordinary and compelling reason.

There are no laws that require a United States citizen to leave the United States and live abroad. The applicant's spouse is not required to leave and go to Nigeria. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

Counsel stated on the prior motion that the Service arrived at its conclusion by totally disregarding all the doctors' reports and arriving at its own diagnosis that Suleiman probably suffered from Major Depressive Disorder as early as August 1994 and, therefore, his disease does not solely hinge on his wife's removal from the United States.

The Service gathered that information from the psychological evaluation of [redacted] dated April 1, 1998, as a result of interviews conducted on March 12, 16 and 23, 1998, by [redacted] stated in the evaluation that from [redacted] description of his mental state at that time, he was probably suffering from Major Depressive Disorder. The depression lasted from August 1994, when he found out about his wife's infidelity, until April 1995,

when he met the woman who would become his second wife. [redacted] second marriage lasted until November 1995. [redacted] report states that the current situation has caused an exacerbation of dormant depressive symptoms. A 1994 psychiatric report reflects that [redacted] expressed failure because he was unable to obtain employment in his field and his relationships with women seemed to end badly.

The record also contains a psychological evaluation of [redacted] by [redacted] who interviewed Suleiman on March 3, 5 and 9, 1998. [redacted] observed that Suleiman reports a history of many difficulties in recent years, with numerous losses. After giving the professional assessments considerable weight, a review of those evaluations clearly reflects that Suleiman's problems with depression substantially pre-date any relationship with the applicant, Suleiman's second marriage, and demonstrate that the applicant's departure from the United States is not the sole cause of his problems.

The record also contains a letter from [redacted] dated August 28, 1998, who states that [redacted] was diagnosed with a severe form of new onset diabetes mellitus type II. Suleiman must now take costly diabetic medications for the rest of his life, monitor his blood sugar levels daily, also at significant cost, and receive regular and frequent follow up medical care. His only access to medical care is through the family medical plan provided by his wife's employer.

The second motion, filed in January 2000, fails to contain any medical documentation regarding Suleiman's regular and frequent follow up care that could be used in consideration of this matter.

After a careful review of the professional documentation submitted regarding the mental and physical health of the applicant's spouse, it is concluded that in their totality this documentation fails to establish that extreme hardship would be imposed upon Suleiman if his spouse is required to leave the United States.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

In Matter of Cervantes-Gonzalez, supra, the Board referred to a decision in Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), in which the court stated that "even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

It is noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam) need not be accorded great weight by the district

director in considering discretionary weight. The applicant in the present matter entered the United States unlawfully in 1991 after attempting to gain admission by fraud in 1990 and married her spouse in 1996. She now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties, the absence of any criminal convictions, the need for the applicant's presence in caring for her husband.

The unfavorable factors in this matter include the applicant's attempted entry by fraud (a felony), her unlawful entry after being returned to Canada, and her lengthy presence in the United States without a lawful admission or parole.

The applicant's actions in this matter cannot be condoned. Her equity (marriage) gained while being unlawfully present in the United States can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

The Board stated in Matter of Cervantes-Gonzalez, that United States Supreme Court ruled in INS v. Yueh-Shaio Yang, that the Attorney General has the authority to consider any and all negative factors, including the alien's initial fraud, in deciding whether or not to grant a favorable exercise of discretion. The Associate Commissioner does not deem it improper to give less weight in a discretionary matter to an alien's marriage which was entered into in the United States following a fraudulent entry and after a period of unlawful residence in the United States as opposed to a marriage entered into abroad followed by a fraudulent entry.

In the latter scenario the alien who marries abroad legitimately gains an equity or family tie which may result in his or her obtaining an immigrant visa and entering the United States lawfully even though the alien may fraudulently enter the United States after the marriage and before obtaining the visa. Whereas in the former scenario the alien who marries after he or she fraudulently enters the United States and resides without Service authorization does gain an after-acquired equity or family tie that he or she was not entitled to without the perpetration of the fraud.

Notwithstanding that the decision in Carnalla-Muñoz v. INS, related to an alien in removal or deportation proceedings, the alien's equity was gained subsequent to a violation of an immigration law, and when considering an issue as a matter of discretion an equity gained contrary to law should receive less weight than an equity gained through legal and legitimate means.

Matter of Goldeshtein, 20 I&N Dec. 382 (BIA 1991), rev'd on other grounds, 8 F.3d 645 (9th Cir. 1993), held that an application for discretionary relief, including a waiver of inadmissibility under § 212(h) of the Act, may be denied in the exercise of discretion without express rulings on the question of statutory eligibility. In that matter, the immigration judge found that there may be

[redacted]

extreme hardship in that particular case but denied the waiver request as a matter of discretion because the applicant's offense was "very serious" and that the applicant failed to establish that she warranted a favorable exercise of discretion. See INS v.Rio-Pineda, 471 U.S. 444, 449 (1985); INS v. Bagamasbad, 429 U.S. 24, 25 (1976). Following Goldeshtein, the Associate Commissioner concludes that an application for discretionary relief under § 212(i) of the Act may also be denied in the exercise of discretion without express rulings on the question of statutory eligibility.

In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the order dismissing the appeal will be reaffirmed.

ORDER: The order of May 14, 1999, dismissing the appeal is reaffirmed.